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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—1196

JOHN THEODORE GILBERT,

Petitioner,

v.

AMERICAN EAGLE TANKER CORP.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reports of the Courts Below

The opinions below appear as appendices A thru D (pp. 13-19) of the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

The statement of questions presented by the Petitioner does not adequately define what is clearly a simplified question involved in this matter. The question is:

Was the Court of Appeals for the Second Circuit correct in affirming the decision of the trial court that Respondent had made tender of full payment of wages under 46 USC Sec. 596 at the time of discharge and that therefore, there was no penalty under that statute due the Petitioner?

Reasons Why the Petition Should be Denied

The decision by the Court of Appeals for the Second Circuit affirms a clear holding of the trial court based upon an issue of credibility between two witnesses who testified live before the trial court. There are no special and important reasons why it should be reviewed by this court. It is not in conflict with the decisions of any other Court of Appeals nor does it present any important question of Federal law not previously decided by this court. The decision below does not conflict with any decision of this court. On the contrary, it is in complete conformity with an earlier decision by this court on the same issue.

The main issue was whether or not there had been a tender of payment so as to comply with the terms of the statute. The court below affirmed the holding of the trial court that there had been compliance with the provisions of the relevant statute.

Statement

The Petitioner was hired by the Respondent as a vacation relief engineer for the S.S. AMERICAN EAGLE out of his New York union hall. He was flown, at Respondent's expense, to join the vessel at the Port of Ras Tanura, Saudi Arabia on December 29, 1972. His term of employment was to end when the regular engineer completed his vacation. Petitioner served aboard the vessel for approximately five months. The vessel, on charter to the U.S. Navy, had been operating in the Far East for approximately two and a half

years and had not been to a United States port during this period. On May 18, 1972, while at sea, Petitioner was advised that the regular engineer would be returning to the vessel on May 20, 1972 when the vessel was to arrive at the port of Ras Tanura. On May 18, 1972 Petitioner was given a voucher work-sheet showing wages due, overtime, tax information and other details. Petitioner made no objection to the information contained on the work-sheet. On the morning of May 20, 1972 the master of the vessel initiated the discharge procedure aboard the vessel since no U.S. Consul was available at Ras Tanura. Petitioner requested and was given $2,000 in cash, a voucher for the balance of wages due and a first-class airline ticket paid for by Respondent, back to New York, his port of engagement. There was a conflict in testimony as to what Petitioner had asked for from the master. Petitioner however, admitted on cross-examination and the court below found, that Petitioner was given exactly what he had requested and that full payment of wages in cash had been tendered to him, which he had declined.

At the time Petitioner was paid the cash and voucher he requested to see a United States Consul for the purpose of resolving a disputed overtime claim. There was no Consul available and there was collective bargaining machinery designed specifically for this purpose. Petitioner took full advantage of this machinery. Subsequent to his leaving the vessel, Petitioner never made any attempt to collect the balance of wages due him and in fact spent several months in Japan after leaving the vessel prior to arrival in New York. The court below found that there was no violation of 46 U.S.C. Sec. 596 nor any violation of 46 U.S.C. Sec. 685.

Subsequent to the entry of judgment by the trial court, the Petitioner was paid the full amount of the balance of wages due him after Petitioner presented the voucher for payment and completed the sign-off procedure.

POINT I

The decision below does not conflict with that of any other court of appeals, does not involve any undecided question of federal law and is in complete conformity with an earlier decision of this court.

Petitioner argues that the decision below conflicts with a "unequivocal Congressional policy". Yet, as the decisions in the Courts below indicate, this case turns on a question of fact as to whether the Petitioner was tendered his full wages at the time he left the vessel at Ras Tanura. It is therefore, subject to the "clearly erroneous" doctrine established by this court. *McAllister* v. *United States,* 348 U.S. 19 (1954); *United States* v. *Oregon Medical Society,* 343 U.S. 326 (1952); *United States* v. *United States Gypsum Co.,* 333 U.S. 364 (1948).

The holding of the court below was that there was no violation of 46 U.S.C. Sec. 596 since full wages were tendered within the periods specified in the statute. This court has had occasion to consider this very question and its holding supports that of the court below. *McCrea* v. *United States,* 294 U.S. 23 (1935). This court, having previously considered 46 U.S.C. Sec. 596, stated:

> "But the liability is conditioned by the statute upon the refusal or neglect to pay wages 'in the manner hereinbefore mentioned without sufficient cause'. The quoted phrase refers to the specified periods within which the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages within the prescribed period. • • •
>
> Thus liability for double wages accrues, if at all, from the end of the period within which payment should have been made. *It must be determined by the happening of an event within the period,* failure to pay wages without sufficient cause. The statute affords a

> definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld. 294 U.S. at 31-32." (Emphasis supplied.)

The record is clear that Petitioner decided not to accept the full wages in cash as tendered. In *McCrea* this court stated the following concerning the availability of penalties where the seaman's action precludes compliance with the statutes:

> "But it affords no basis for recovery if, by his own conduct he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it." 294 U.S. at 32.

Norris, the Law of Seaman, Sec. 388 states the rule succinctly:

> "The refusal of a seaman to accept all of the wages due him at the time of his discharge will not justify a double wage penalty."

Petitioner's argument as to a statutory scheme simply presents no issue to be considered by this court. Petitioner persists in its argument that an alleged failure to take a seaman before a United States Consul provides a ground for the award of the penalty under 46 U.S.C. Sec. 596. To begin with, the court below found that there was no Consul available and therefore, there was no breach of any statutory provision in this regard. Even more importantly, however, there is no authority cited and indeed none exists to support the argument that failure to take a seaman before a U.S. Consul is a violation of 46 U.S.C. Sec. 596. The cases cited in support of Petitioner's argument that it is unlawful to pay a seaman without the presence of a U.S. Consul have been dealt with at length in the briefs submitted to the court below.

Despite the arguments of petitioner, there is simply no question for review by this court. The court below determined that there was no violation of the provisions of 46 U.S.C. Sec. 596 nor of any other statute and it is respectfully submitted that these findings are fully supported by the record and fully in accordance with statutory and case law dealing with those statutes.

Petitioner is urging this court to undertake a redrafting of the clear statutory language of Congress. Petitioner is unable to demonstrate any error by the court below and has resorted to the creation of an illusory issue for this court. By arguing that the court below has interfered with a "Congressional scheme" for the protection of seamen, Petitioner asks this court to ignore the specific statutory language as well as the findings below that Respondent did not violate any of those statutes. It is respectfully submitted that this is something that this court cannot, and should not do.

POINT II

Once it has been held that there is no violation of 46 U.S.C. Sec. 596, events occurring subsequently do not revive the penalties under that section.

As pointed out previously, this court has held that if there is no violation within the periods specified in 46 U.S.C. Sec. 596 no cause of action for penalties will ever accrue. *McCrea* v. *United States,* 294 U.S. 23 (1935).

Respondents have contended throughout this case, and such contention is supported by the decision of the court below, that there was never any refusal or neglect to make payment within the meaning of 46 U.S.C. Sec. 596 at any time. Even assuming *arguendo* that there was such a neglect or refusal after Petitioner left the vessel, there is no provision under the statute for the penalty to run once there has been compliance with its terms in the first instance.

Petitioner requests this court not only to rewrite the provisions of 46 U.S.C. Sec. 596 but also, to rule, contrary to this court's prior decisions, that an affirmative rejection by a seaman of a tender of his wages is meaningless within the terms of the statute. Petitioner asks this court to rewrite the statute so as to provide that a shipowner, in this day of powerful maritime unions, would be required to physically force upon a seaman his full wages in cash whether or not he wanted them. Presumably, after a seaman left his vessel the shipowner would be obligated to track the man down anywhere in the world and force upon him his wages. Patently this is absurd.

Here, the facts do not even support Petitioner's erroneous view of the law and even were the facts as Petitioner wishes they were, there is nothing that compels a review of the applicable law by this court. The relevant statutes were correctly interpreted and applied by the court below. The seamen's statutes, products of the conditions that existed in the mid-nineteenth century, are more than adequate in the modern age of labor militancy.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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